

March 15, 2004

Mr. Ben Davidian
Sweeney, Davidian, Greene & Grant, LLP
8001 Folsom Boulevard, Suite 101
Sacramento, CA 95826

**Re: Your Request for Advice
Our File No. A-04-061**

Dear Mr. Davidian:

This letter is in response to your request for advice regarding the campaign provisions of the Political Reform Act (the "Act").¹

QUESTION

Under the post-election fundraising provisions of the Act, may a candidate continue to accept contributions into his existing primary campaign account after the date of the primary election, in order to pay legal fees incurred in connection with a pre-certification ballot count or recount, so long as the candidate continues to abide by the applicable contribution limits?

CONCLUSION

In a close call election, the costs of legal fees and expenses incurred directly in connection with the ballot count or recount are integral to the election, and fall within the definition of "net debts outstanding from the election" in section 85316 and regulation 18531.61(d). Therefore, a candidate in a close contest with little or no funds remaining after the election may continue to accept contributions into his existing primary campaign account to pay for such expenses subject to applicable contribution limits and the requirements of regulation 18531.61.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

Your firm represents the interests of Dr. William Emmerson, a candidate for the Republican nomination in the 63rd Assembly District. That district includes portions of San Bernardino and Riverside Counties. The March 2, 2004, primary election campaign in the 63rd Assembly District was an arduous battle involving multiple candidates for the Republican nomination. Dr. Emmerson and his primary opponents raised and spent substantial funds in the campaign. As reported by the Secretary of State, the initial vote count showed a difference of merely 205 votes between the top two vote recipients. Dr. Emmerson is currently ahead in the vote count, but the latest count of absentee ballots puts the vote difference at only 152, with thousands of provisional ballots remaining to be evaluated and counted.

Dr. Emmerson has retained your firm to protect his interests in the vote count and, if his margin over his competitors holds, to defend his victory in the event of a recount or election contest. However, the "Bill Emmerson for Assembly" campaign committee has used practically all of its funds in the primary campaign, leaving little or no funds for the payment of attorney's fees that will be incurred in the ballot count or in any ensuing recount or election contest. Under the proposed arrangement with your firm, Dr. Emmerson would pay the firm a retainer for its anticipated work over the next week, plus additional fees for any additional work beyond that time.

ANALYSIS

Section 85316 restricts post-election fundraising as follows:

"A contribution for an election may be accepted by a candidate for elective state office after the date of the election only to the extent that the contribution does not exceed net debts outstanding from the election, and the contribution does not otherwise exceed the applicable contribution limit for that election."

In addition, regulation 18531.61, adopted in January of 2004, provides as follows:

"(a) As of January 24, 2004, a contribution for an election, regardless of when held, may be accepted by a candidate for elective state office after the date of the election only to the extent that the contribution does not exceed net debts outstanding from the election. For purposes of section 85316, 'the applicable contribution limit for that election' means the contribution limits, if any, as provided in Government Code sections 85301 and 85302 applicable on the date of the election.

(b) Transfers to a committee formed for an election held on or after January 1, 2001, or November 6, 2002, for statewide elective office, are subject to the requirements of 2 Cal. Code Regs. section 18536.

(c) A candidate for elective state office subject to subdivision (a) of this regulation may use contributions accepted pursuant to Government Code sections 85316 and 85321 only for payment of net debts outstanding for an election.

(d) For purposes of this section, 'net debts outstanding' includes the following:

(1) An amount necessary to cover the cost of raising funds as permitted under this section;

(2) Any costs associated with complying with the post-election requirements of this Title and other necessary administrative costs associated with winding down the campaign, including office space rental, staff salaries, and office supplies; and

(3) The total amount of unpaid debts, loans and accrued expenditures incurred with respect to an election, less the sum of:

(A) The total cash on hand available to pay those debts and obligations, including: currency; balances on deposit in banks, savings and loan institutions, and other depository institutions; traveler's checks; certificates of deposit; treasury bills; and any other committee investments valued at fair market value; and

(B) The total amounts owed to the candidate controlled committee in the form of credits, refunds of deposits, returns, or receivables, or a commercially reasonable amount based on the collectibility of those credits, refunds, returns, or receivables.

The amount of the net debts outstanding shall be reduced as additional funds are received. The candidate and his or her controlled committee(s) may accept contributions made after the date of an election, if such contributions do not exceed the amount of net debts outstanding on the date the contribution is received. Any contribution that exceeds the amount of net debts outstanding shall be treated in the same manner as a contribution in excess of the contribution limits."

Under state law, a certified statement of the results of the election must be prepared within 28 days of the election.² The county registrar of voters automatically tabulates the main bulk of the ballots, typically 90 percent or more, as soon as they come in. The rest of the ballots are absentee ballots and provisional ballots, given to those voters who claim to be properly registered, but who cannot be immediately identified on the registered voter index at the particular precinct where they arrived to vote. The absentee ballots and provisional ballots are counted by hand, as are any ballots that are mutilated or unable to be processed automatically. The absentee ballots must be checked to make sure the signatures are accurate, and the provisional ballots must be checked to make sure the voter cast his ballot in the district in which he or she is registered. In elections where the ballot count is extremely close, it is common for candidates, lawyers, and volunteers for the respective campaigns to go to the county registrar of voters and monitor the vote count.

² California Elections Code § 15372.

In a close race, the ballot count and any recount are an integral and critical part of the election. Accordingly, legal fees incurred in connection with a precertification ballot count or a recount in a close race fall within the definition of “net debts outstanding from the election” in section 85316 and regulation 18531.61(d). Therefore, a candidate may continue to raise contributions under applicable limits following the date of the election to pay for these expenses, pursuant to the requirements of regulation 18531.61.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Hyla P. Wagner
Senior Counsel, Legal Division

HPW:jg
I:\AdviceLtrs\04-061